

Donald H. Nichols, MN State Bar No. 78918
(admitted **pro hac vice**)
Paul J. Lukas, MN State Bar No. 22084X
(admitted **pro hac vice**)
Tim C. Selander, MN Bar No. 0387016
(admitted **pro hac vice**)
NICHOLS KASTER & ANDERSON, PLLP
4600 IDS Center
80 S. 8th Street
Minneapolis, MN 55402

Bryan J. Schwartz, CA State Bar No. 209903
Matthew C. Helland, CA State Bar No. 250451
NICHOLS KASTER & ANDERSON, LLP
One Embarcadero Center, Ste. 720
San Francisco, CA 94111

Attorneys for Individual and Representative Plaintiffs

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Philip Wong, Frederic Chaussy, Leslie
Marie Shearn, and Chad Barbiere,
individually, on behalf of all others
similarly situated, and on behalf of the
general public,

Plaintiffs,

vs.

HSBC Mortgage Corporation (USA);
HSBC Bank USA, N.A.; and DOES 1
through 50, inclusive,

Defendants.

Case No.: 3:07-cv-2446

CLASS ACTION

**SECOND AMENDED COMPLAINT FOR
DAMAGES, RESTITUTION AND
INJUNCTIVE RELIEF**

**(1) Violations of Fair Labor
Standards Act, 29 U.S.C. Section 201, et
seq.**

**(2) Overtime Violations (California
Labor Code Sections 510, 1194 and 1198,
and IWC Wage Order(s))**

**(3) Waiting Time Penalties
(California Labor Code Sections 201-203)**

**(4) Failure to Provide Itemized Wage
Statements (California Labor Code Section
226)**

**(5) Failure to Provide and/or
Authorize Meal and Rest Periods
(California Labor Code Section 512)**

**(6) Violation of California Business
and Professions Code Sections 17200 et
seq.**

**(7) Violation of New York Wage and
Hour Law (New York Labor Law Article
19, §§ 650 et seq., and New York State
Department of Labor Regulations, 12
N.Y.C.R.R. Part 142)**

(8) Violation of New Jersey Wage

and Hour Law, N.J.S.A. Section 34:11, et seq., N.J.A.C. Section 12:56, et seq.

(9) Unlawful Deductions from Wages (California Labor Code Section 221 and 224, IWC Wage Order 4; N.Y. Lab. Law Sec. 193(1); N.Y. Comp. Codes. R. & Regs. Tit. 12, Sec. 142-1.1 et seq.; N.J. Stat. Ann. Sec. 34:11-4.4)

DEMAND FOR JURY TRIAL

PRELIMINARY STATEMENT

1. This is a collective and class action brought by Individual and Representative Plaintiffs Philip Wong, Frederic Chaussy, Leslie Marie Shearn, and Chad Barbieri (collectively "Plaintiffs"), on their own behalf and on behalf of the proposed class identified below. Plaintiffs and the putative class members were or are employed by Defendants: HSBC Mortgage Corporation (USA); HSBC Bank USA, N.A.; and certain Doe Defendants, or their predecessors-in-interest. Plaintiffs and the putative class members were or are employed as "Retail Mortgage Lending Consultants," "Senior Retail Mortgage Lending Consultants," "Retail Mortgage Consultants," and "Premier Mortgage Sales Officers" (collectively known as "loan officers"), "Field Administrators," "Senior Field Administrators," "Loan Production Office Assistants," "Senior Loan Production Office Assistants," "Retail Mortgage Lending Consultant Assistants," "Senior Retail Mortgage Lending Consultant Assistants," and "Mortgage Sales Support Specialists" (collectively known as "sales assistants"), and other non-management mortgage sales employees, who were misclassified as exempt and therefore erroneously denied overtime, meal and rest period compensation as required by state and federal wage and hour laws, and/or were not paid fully for overtime hours works (required to work "off-the-clock"). These employees are similarly situated under Federal Rule of Civil Procedure 23 ("Rule 23") and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b).

2. The Collective Class (FLSA) is made of all persons who are or have been employed by Defendants as "Retail Mortgage Lending Consultants," "Senior Retail Mortgage Lending Consultants," "Retail Mortgage Consultants," and "Premier Mortgage Sales Officers" (collectively known as "loan officers"), "Field Administrators," "Senior Field Administrators,"

1 “Loan Production Office Assistants,” “Senior Loan Production Office Assistants,” “Retail
2 Mortgage Lending Consultant Assistants,” “Senior Retail Mortgage Lending Consultant
3 Assistants,” and “Mortgage Sales Support Specialists” (collectively known as “sales assistants”),
4 and other non-management mortgage sales employees, who were misclassified as exempt, and
5 therefore erroneously denied overtime compensation as required by federal wage and hour laws,
6 and/or were not paid fully for overtime hours worked (required to work “off-the-clock”), at any
7 time within the United States within three years prior to this action’s filing date through the date
8 of final disposition of this action (the “Collective Class Period”).

9 3. The California Class (Rule 23) is made up of all persons who are or have been
10 employed by Defendants as “Retail Mortgage Lending Consultants,” “Senior Retail Mortgage
11 Lending Consultants,” “Retail Mortgage Consultants,” and “Premier Mortgage Sales Officers”
12 (collectively known as “loan officers”), “Field Administrators,” “Senior Field Administrators,”
13 “Loan Production Office Assistants,” “Senior Loan Production Office Assistants,” “Retail
14 Mortgage Lending Consultant Assistants,” “Senior Retail Mortgage Lending Consultant
15 Assistants,” and “Mortgage Sales Support Specialists” (collectively known as “sales assistants”),
16 and other non-management mortgage sales employees, who were misclassified as exempt, and
17 therefore erroneously denied overtime, meal and rest period compensation as required by state
18 wage and hour laws, and/or were not paid fully for overtime hours worked (required to work “off-
19 the-clock”), within the State of California within the period four years prior to the filing date of
20 this Complaint (“the California Class Period”). The California Class was also subject to a policy
21 resulting in unlawful deductions from wages.

22 4. The New York Class (Rule 23) is made up of all persons who are or have been
23 employed by Defendants as “Retail Mortgage Lending Consultants,” “Senior Retail Mortgage
24 Lending Consultants,” “Retail Mortgage Consultants,” and “Premier Mortgage Sales Officers”
25 (collectively known as “loan officers”), “Field Administrators,” “Senior Field Administrators,”
26 “Loan Production Office Assistants,” “Senior Loan Production Office Assistants,” “Retail
27 Mortgage Lending Consultant Assistants,” “Senior Retail Mortgage Lending Consultant
28

1 Assistants,” and “Mortgage Sales Support Specialists” (collectively known as “sales assistants”),
2 and other non-management mortgage sales employees, who were misclassified as exempt, and
3 therefore erroneously denied overtime compensation as required by state wage and hour laws,
4 and/or were not paid fully for overtime hours worked (required to work “off-the-clock”), within
5 the State of New York within the period six years prior to the filing date of this Complaint (“the
6 New York Class Period”). The New York Class was also subject to a policy resulting in unlawful
7 deductions from wages.

8 5. The New Jersey Class (Rule 23) is made up of all persons who are or have been
9 employed by Defendants as “Retail Mortgage Lending Consultants,” “Senior Retail Mortgage
10 Lending Consultants,” “Retail Mortgage Consultants,” and “Premier Mortgage Sales Officers”
11 (collectively known as “loan officers”), “Field Administrators,” “Senior Field Administrators,”
12 “Loan Production Office Assistants,” “Senior Loan Production Office Assistants,” “Retail
13 Mortgage Lending Consultant Assistants,” “Senior Retail Mortgage Lending Consultant
14 Assistants,” and “Mortgage Sales Support Specialists” (collectively known as “sales assistants”),
15 and other non-management mortgage sales employees, who were misclassified as exempt, and
16 therefore erroneously denied overtime period compensation as required by state wage and hour
17 laws, and/or were not paid fully for overtime hours worked (required to work “off-the-clock”),
18 within the State of New Jersey within the period two years prior to the filing date of this
19 Complaint (“the New Jersey Class Period”). The New Jersey Class was also subject to a policy
20 resulting in unlawful deductions from wages.

21 6. During the Collective Class Period and the Class Period, Defendants failed to pay
22 overtime, meal and rest period compensation to each member of the Class as required by state and
23 federal law. Defendants also made unlawful deductions from wages. Plaintiffs seek relief for the
24 Class pursuant to the applicable provisions of the state laws of California, New York, and New
25 Jersey. Plaintiffs also seek relief for the Collective Class under the Fair Labor Standards Act. All
26 of the relief sought is to remedy the Defendants’ failure to pay all wages and premiums due, pay
27 appropriate overtime compensation, to provide and authorize meal and rest periods, to pay
28

1 waiting time penalties, and maintain accurate time records, in addition to compensation for the
2 unlawful deductions and injunctive relief.

3 **THE PARTIES**

4
5 7. Individual and representative Plaintiff Philip Wong resides in San Mateo County,
6 California. He was employed by Defendants from approximately December 2005 to March 2008
7 as a loan officer working in San Francisco, San Mateo, and Alameda Counties, California.
8 Plaintiff brings his claims on behalf of himself and the Collective and California Classes.

9
10 8. Individual and representative Plaintiff Frederic Chaussy resides in Contra Costa
11 County, California. He was employed by Defendants from approximately April 2006 to April
12 2007 as a loan officer working in San Francisco, Santa Clara, San Mateo, and Alameda Counties,
13 California. Plaintiff brings his claims on behalf of himself and the Collective and California
14 Classes.

15 9. Individual and representative Plaintiff Leslie Marie Shearn resides in Orange
16 County, New York. She was employed by Defendants from approximately September 2001 to
17 November 2006 as a sales assistant and loan officer, working in Orange County, New York, and
18 Bergen and Morris Counties, New Jersey. Plaintiff brings her claims on behalf of herself and the
19 Collective and New York and New Jersey Classes.

20
21 10. Individual and representative Plaintiff Chad Barbieri resides in Passaic County,
22 New Jersey. He was employed by Defendants from approximately April 2006 to February 2007
23 as a loan officer, working in Hudson, Bergen, and Morris Counties, New Jersey. Plaintiff brings
24 her claims on behalf of herself and the Collective and New Jersey Classes.

25
26 11. Upon information and belief, Defendant HSBC Mortgage Corporation (USA), is a
27 corporation doing business in and maintaining places of business in several states throughout the
28

1 United States, including, among other locations, at various times, facilities in San Francisco,
2 Redwood City, San Mateo, Palo Alto, Milpitas, Cupertino, Oakland, and Fremont, California,
3 around New Jersey, and around New York.

4
5 12. Upon information and belief, Defendant HSBC Bank USA, N.A., is a corporation
6 doing business in and maintaining places of business in several states throughout the United
7 States, including, among other locations, at various times, facilities in San Francisco, Redwood
8 City, San Mateo, Palo Alto, Milpitas, Cupertino, Oakland, and Fremont, California, around New
9 Jersey, and around New York, and including business through its wholly-owned subsidiary
10 HSBC Mortgage Corporation (USA).

11
12 13. Defendants Does 1-50, inclusive, are sued herein under fictitious names. Their
13 true names and capacities are unknown to Plaintiffs. When their true names and capacities are
14 ascertained, Plaintiffs will amend this complaint by inserting their true names and capacities
15 herein. Plaintiffs are informed and believe and thereon allege that each of the fictitiously-named
16 Defendants is responsible in some manner for the occurrences herein alleged, and that the
17 damages of Plaintiffs and the putative class members herein alleged were proximately caused by
18 such Defendants.

19
20 14. Plaintiffs are informed, believe, and thereon allege that each of the Defendants
21 herein was, at all times relevant to this action, an agent, employee, representing partner,
22 integrated enterprise with, and/or joint venturer of the remaining Defendants and was acting
23 within the course and scope of the relationship. Plaintiffs are further informed, believe, and
24 thereon allege that each of the Defendants herein gave consent to, ratified and authorized the acts
25 alleged herein to the remaining Defendants.

26 **JURISDICTION AND VENUE**
27
28

through the date of final disposition of this action

19. Upon information and belief, Defendants suffered and permitted Plaintiffs and the Collective Class to work more than forty hours per week without overtime compensation.

20. Defendants' unlawful conduct has been widespread, repeated and consistent.

21. Upon information and belief, Defendants knew that Plaintiffs and the Collective Class performed work that required overtime pay. Defendants have operated under a scheme to deprive these employees of overtime compensation by failing to properly compensate them for all hours worked.

22. Defendants' conduct, as set forth in this Complaint, was willful and in bad faith, and has caused significant damages to Plaintiffs and the Collective Class.

23. Defendants are liable under the FLSA for failing to properly compensate Plaintiffs and the Collective Class, and as such, notice should be sent to the Collective Class. There are numerous similarly situated current and former employees of Defendants who have been denied overtime pay in violation of the FLSA who would benefit from the issuance of a Court supervised notice of the present lawsuit and the opportunity to join in the present lawsuit. Those similarly situated employees are known to Defendants and are readily identifiable through Defendants' records.

CLASS ACTION ALLEGATIONS

24. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure 23 on behalf of the following defined classes:

California Class: All persons who are or have been employed by Defendants as "Retail Mortgage Lending Consultants," "Senior Retail Mortgage Lending Consultants," "Retail Mortgage Consultants," and "Premier Mortgage Sales Officers" (collectively known as "loan officers"), "Field Administrators," "Senior Field Administrators," "Loan Production Office Assistants," "Senior Loan Production Office Assistants," "Retail Mortgage Lending Consultant Assistants," "Senior Retail Mortgage Lending Consultant Assistants," and "Mortgage Sales Support Specialists"

(collectively known as “sales assistants”), and other non-management mortgage sales employees, who were misclassified as exempt, and therefore erroneously denied overtime compensation, as required by state wage and hour laws, and/or were not paid fully for overtime hours worked (required to work “off-the-clock”), and/or who suffered unlawful deductions from wages, within the State of California within the period four years prior to the filing date of this Complaint.

New York Class: All persons who are or have been employed by Defendants as “Retail Mortgage Lending Consultants,” “Senior Retail Mortgage Lending Consultants,” “Retail Mortgage Consultants,” and “Premier Mortgage Sales Officers” (collectively known as “loan officers”), “Field Administrators,” “Senior Field Administrators,” “Loan Production Office Assistants,” “Senior Loan Production Office Assistants,” “Retail Mortgage Lending Consultant Assistants,” “Senior Retail Mortgage Lending Consultant Assistants,” and “Mortgage Sales Support Specialists” (collectively known as “sales assistants”), and other non-management mortgage sales employees, who were misclassified as exempt, and therefore erroneously denied overtime compensation, as required by state wage and hour laws, and/or were not paid fully for overtime hours worked (required to work “off-the-clock”), and/or who suffered unlawful deductions from wages, within the State of New York within the period six years prior to the filing date of this Complaint.

New Jersey Class: All persons who are or have been employed by Defendants as “Retail Mortgage Lending Consultants,” “Senior Retail Mortgage Lending Consultants,” “Retail Mortgage Consultants,” and “Premier Mortgage Sales Officers” (collectively known as “loan officers”), “Field Administrators,” “Senior Field Administrators,” “Loan Production Office Assistants,” “Senior Loan Production Office Assistants,” “Retail Mortgage Lending Consultant Assistants,” “Senior Retail Mortgage Lending Consultant Assistants,” and “Mortgage Sales Support Specialists” (collectively known as “sales assistants”), and other non-management mortgage sales employees, who were misclassified as exempt, and therefore erroneously denied overtime compensation, as required by state wage and hour laws, and/or were not paid fully for overtime hours worked (required to work “off-the-clock”), and/or who suffered unlawful deductions from wages, within the State of New Jersey within the period two years prior to the filing date of this Complaint.

25. Numerosity: Each Proposed Class is so numerous that joinder of all members is impracticable. Plaintiffs are informed and believe, and on that basis allege, that during the relevant time period, Defendants employed more than 50 people who satisfy the definition of each Proposed Class.

1 26. Typicality: The Plaintiffs' claims are typical of the members of the Proposed
2 Class. Plaintiffs are informed and believe that, during the Class Period, like other "Retail
3 Mortgage Lending Consultants," "Senior Retail Mortgage Lending Consultants," "Retail
4 Mortgage Consultants," and "Premier Mortgage Sales Officers" (collectively known as "loan
5 officers"), "Field Administrators," "Senior Field Administrators," "Loan Production Office
6 Assistants," "Senior Loan Production Office Assistants," "Retail Mortgage Lending Consultant
7 Assistants," "Senior Retail Mortgage Lending Consultant Assistants," and "Mortgage Sales
8 Support Specialists" (collectively known as "sales assistants"), and other non-management
9 mortgage sales employees who were misclassified as exempt, they routinely worked more than
10 eight hours per day and more than 40 hours per week, and routinely worked through meal and rest
11 periods, and/or were required to work overtime hours without compensation ("off-the-clock"),
12 and/or suffered unlawful deductions from their wages. Plaintiffs had the same duties and
13 responsibilities as other Class members. Plaintiffs were subject to Defendants' policy and practice
14 of improperly treating and classifying employees in these positions as "exempt" from state wage
15 and hour laws, failing to pay appropriate overtime compensation, failing to provide or authorize
16 meal and rest breaks in compliance with state laws, failing to maintain accurate time records of
17 hours worked by the Proposed Class or to issue accurate itemized wage statements to these
18 individuals, and/or taking deductions unlawfully from wages to reimburse the Defendants for
19 potential customers' loan application fees.

20 27. Superiority: A class action is superior to other available methods for the fair and
21 efficient adjudication of the controversy, particularly in the context of wage and hour litigation
22 where individual plaintiffs lack the financial resources to vigorously prosecute separate lawsuits
23 in federal court against large corporate Defendants. Prosecuting hundreds of identical, individual
24 lawsuits nationwide does not promote judicial efficiency or equity and consistency in judicial
25 results.

26 28. Adequacy: Plaintiffs will fairly and adequately protect the interests of the
27 Proposed Class, and they have retained counsel experienced in complex, nationwide wage and
28

1 hour class and collective action litigation.

2 29. Commonality: Common questions of law and fact exist to all members of the
3 Proposed Class and predominate over any questions solely affecting individual members of the
4 Proposed Class, including but not limited to:

- 5 A. Whether Defendants improperly classified the members of the Proposed
6 Class as exempt;
- 7 B. Whether Defendants unlawfully failed to pay appropriate overtime
8 compensation to members of the Proposed Class in violation of the state
9 wage laws;
- 10 C. Whether Defendants employed Plaintiffs and the Proposed Class within the
11 meaning of the applicable state laws;
- 12 D. Whether Plaintiffs and the Proposed Class' members who are no longer
13 employed with Defendants are entitled to waiting time penalties pursuant to
14 the applicable state laws;
- 15 E. Whether Defendants' policies and practices provide and/or authorize meal
16 and rest periods in compliance with applicable state laws;
- 17 F. Whether Defendants failed to keep accurate time records for all hours
18 worked by the Plaintiffs and the Proposed Class in violation of state wage
19 laws;
- 20 G. Whether Defendants provided adequate itemized wage statements to the
21 Plaintiffs and the Class pursuant to state wage laws;
- 22 H. Whether Defendants made unlawful deductions from employees' wages
23 when employees were forced to reimburse Defendants for loan application
24 fees on failed loans;
- 25 I. The proper measure of damages sustained by the Proposed Class; and
- 26 J. Whether Defendants' actions were "willful."

27 30. This case is maintainable as a class action under Fed. R. Civ. P. 23(b)(1) because
28

1 prosecution of actions by or against individual members of the class would result in inconsistent
2 or varying adjudications and create the risk of incompatible standards of conduct for Defendants.
3 Further, adjudication of each individual member's claim as a separate action would be dispositive
4 of the interest of other individuals not party to this action, impeding their ability to protect their
5 interests.

6 31. Class certification is also appropriate under Fed. R. Civ. P. 23(b)(3) because
7 questions of law and fact common to the Proposed Class predominate over any questions
8 affecting only individual members of the Proposed Class, and because a class action is superior to
9 other available methods for the fair and efficient adjudication of this litigation. Defendants'
10 common and uniform policies and practices denied the Proposed Class the overtime pay and other
11 compensation to which they are entitled, and resulted in the unlawful deductions. The damages
12 suffered by the individual Proposed Class members are small compared to the expense and
13 burden of individual prosecution of this litigation. In addition, class certification is superior
14 because it will obviate the need for unduly duplicative litigation that might result in inconsistent
15 judgments about Defendants' practices.

16 32. Plaintiffs intend to send notice to all members of the Proposed Class to the extent
17 required by Rule 23. The names and address of the Proposed Class are available from
18 Defendants.

19 **FIRST CLAIM FOR RELIEF**

20 **(Failure to Pay Overtime Compensation in Violation of the Fair Labor Standards Act)**

21 33. Plaintiffs allege and incorporate by reference the allegations in the preceding
22 paragraphs.

23 34. Plaintiffs consent in writing to be a part of this action, pursuant to 29 U.S.C. §
24 216(b). Plaintiffs written consent forms are attached hereto as **Exhibit A**. Plaintiffs anticipate
25 that as this case proceeds, other individuals will sign consent forms and join as plaintiffs.

26 35. At all relevant times, Defendants has been, and continue to be, "employers"
27 engaged in interstate commerce and/or in the production of goods for commerce, within the
28

1 meaning of the FLSA, 20 U.S.C. § 203. At all relevant times, Defendants have employed and
2 continue to employ employees, including Plaintiffs, and the Collective Class. At all relevant
3 times, upon information and belief, each Defendant corporation has had gross operating revenues
4 in excess of \$500,000.00.

5 36. The FLSA requires each covered employer such as Defendants to compensate all
6 non-exempt employees at a rate of not less than one and one-half times the regular rate of pay for
7 work performed in excess of forty hours per work week.

8 37. During their employment with Defendants, within the applicable statute of
9 limitations, Plaintiffs and the other Collective Class members worked in excess of forty hours per
10 workweek without overtime compensation. Despite the hours worked by Plaintiffs and the
11 Collective Class members, Defendants willfully, in bad faith, and in knowing violation of the
12 Federal Fair Labor Standards Act, failed and refused to pay them overtime compensation.

13 38. By failing to accurately record, report, and/or preserve records of hours worked by
14 Plaintiffs and the Collective Class, Defendants has failed to make, keep, and preserve records
15 with respect to each of its employees sufficient to determine their wages, hours, and other
16 conditions and practice of employment, in violation of the FLSA, 29 U.S.C. § 201, *et seq.*

17 39. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA,
18 within the meaning of 29 U.S.C. § 255(a).

19 40. Plaintiffs, on behalf of themselves and the Collective Class, seek damages in the
20 amount of their respective unpaid overtime compensation, liquidated damages from three years
21 immediately preceding the filing of this action, plus interests and costs as allowed by law,
22 pursuant to 29 U.S.C. §§ 216(b) and 255(a), and such other legal and equitable relief as the Court
23 deems just and proper.

24 41. Plaintiffs, on behalf of themselves and the Collective Class, seek recovery of their
25 attorneys' fees and costs to be paid by Defendants, as provided by the FLSA, 29 U.S.C. § 216(b).

26 **SECOND CLAIM FOR RELIEF**

27 **(Failure to Pay Overtime Compensation in Violation of California Law)**

1 42. The California Plaintiffs allege and incorporate by reference the allegations in the
2 preceding paragraphs.

3 43. At all relevant times herein, IWC Wage Order No. 4 (8 C.C.R. § 11040) and
4 California Labor Code § 510 required an employer, such as Defendants, to pay overtime
5 premium(s) for hours worked in excess of 8 in a given workday, 40 in a given workweek, or on
6 the seventh day worked in a single workweek. Pursuant to California Labor Code § 1198, it is
7 unlawful to employ persons for hours longer than the hours set by the Industrial Welfare
8 Commission (“IWC”), or under conditions prohibited by the applicable wage orders of the IWC.

9 44. Plaintiffs are informed and believe, and thereon allege, that members of the Class
10 worked in excess of eight hours per day and in excess of 40 hours per week, and Defendants
11 unlawfully failed to pay members of the Class the overtime required in violation of IWC Wage
12 Order 4 (8 C.C.R. § 11040, as amended during the Class Period), and the California Labor Code
13 §§ 510 and 1198. Pursuant to California Labor Code § 1194, Plaintiffs and the other Class
14 Members are entitled to recover their unpaid overtime compensation.

15 45. As a direct and proximate result of Defendants’ unlawful conduct, as set forth
16 herein, Plaintiffs and the Class have sustained damages, including loss of earnings for hours of
17 overtime worked on behalf of Defendants in an amount to be established at trial, plus interest,
18 attorneys’ fees and costs.

19 **THIRD CLAIM FOR RELIEF**

20 **(Waiting Time Penalties)**

21 46. The California Plaintiffs allege and incorporate by reference the allegations in the
22 preceding paragraphs.

23 47. During the relevant time period, many Class members were employed by and
24 thereafter terminated by or resigned from their positions with Defendants. Defendants, however,
25 willfully failed to pay such Class Members all wages owed them (including overtime wages)
26 within the time limits set forth in California Labor Code sections 201 and 202.

1 53. California Labor Code section 512 prohibits an employer from employing an
2 employee for a work period of more than five hours per day without providing the employee with
3 a meal period of not less than 30 minutes, or for a work period of more than 10 hours per day
4 without providing the employee with a second meal period of not less than 30 minutes.

5 54. Section 11 of Wage Order No. 4 provides (and at all times relevant hereto
6 provided) in relevant part that:

7
8 No employer shall employ any person for a work period of more
9 than five (5) hours without a meal period of not less than 30
10 minutes, except that when a work period of not more than six (6)
11 hours will complete the day's work the meal period may be waived
12 by mutual consent of the employer and employee. Unless the
13 employee is relieved of all duty during a 30 minute meal period, the
14 meal period shall be considered an "on duty" meal period and
15 counted as time worked. An "on duty" meal period shall be
16 permitted only when the nature of the work prevents an employee
17 from being relieved of all duty and when by written agreement
18 between the parties an on-the-job paid meal period is agreed to. The
19 written agreement shall state that the employee may, in writing,
20 revoke the agreement at any time. If an employer fails to provide
21 an employee a meal period in accordance with the applicable
22 provisions of this Order, the employer shall pay the employee one
23 (1) hour of pay at the employee's regular rate of compensation for
24 each work day that the meal period is not provided.

25 55. Section 12 of Wage Order No. 4 provides (and at all times relevant hereto
26 provided) in relevant part that:

27 Every employer shall authorize and permit all employees to take
28 rest periods, which insofar as practicable shall be in the middle of
each work period. The authorized rest period time shall be based on
the total hours worked daily at the rate of ten (10) minutes net rest
time per four (4) hours or major fraction thereof. However, a rest
period need not be authorized for employees whose total daily work
time is less than three and one-half (3 ½) hours. Authorized rest
period time shall be counted, as hours worked, for which there shall
be no deduction from wages. If an employer fails to provide an
employee a rest period in accordance with the applicable provisions
of this Order, the employer shall pay the employee one (1) hour of
pay at the employee's regular rate of compensation for each work
day that the rest period is not provided.

56. California Labor Code section 226.7 prohibits any employer from requiring any employee to work during any meal or rest period mandated by an applicable IWC wage order, and provides that an employer that fails to provide an employee with a required rest break or meal period shall pay that employee one additional hour of pay at the employee's regular rate of compensation for each work day that the employer does not provide a compliant meal or rest period.

57. Defendants failed to provide Plaintiffs and Class Members with meal periods as required by law, and failed to authorize and permit Plaintiffs and Class Members to take rest periods as required by law. Plaintiffs and the Class Members are therefore entitled to payment of the meal and rest period premiums as provided by law.

SIXTH CLAIM FOR RELIEF

(Unfair Practice under the Unfair Competition Act)

58. The California Plaintiffs allege and incorporate by reference the allegations in the preceding paragraphs.

59. Section 17200 of the California Business and Professions Code — California's Unfair Competition Law — prohibits unfair competition by prohibiting, *inter alia*, any unlawful or unfair business acts or practices. The foregoing conduct by Defendants, as alleged, constitutes unlawful business actions and practices in violation of Section 17200, *et seq.*

60. Pursuant to Business and Professions Code § 17200 *et seq.*, Plaintiffs and the Class Members are entitled to restitution of the overtime earnings and other unpaid wages and premiums alleged herein that Defendants has improperly withheld and retained during a period that commences four years prior to the filing of this action, a permanent injunction requiring Defendants to pay minimum wage and overtime to all workers as defined herein, in California, an award of attorneys' fees pursuant to Code of Civil Procedure section 1021.5 and other applicable law, and costs.

SEVENTH CLAIM OF RELIEF

Violation of New Jersey Wage and Hour Law, N.J.S.A. § 34:11, et seq., and N.J.A.C. §12:56, et seq.

(On Behalf of the New Jersey Named Plaintiff and New Jersey Class)

1
2
3 61. The New Jersey Named Plaintiffs, Leslie Marie Shearn and Chad Barbieri, on
4 behalf of themselves and all members of the New Jersey Class, allege and incorporate by
5 reference the allegations in the preceding paragraphs.

6 62. Defendants have engaged in a widespread pattern, policy, and practice of violating
7 the New Jersey State Wage and Hour Law, N.J.S.A. § 34:11, et seq., and N.J.A.C. 12:56, et seq.,
8 as detailed herein.

9 63. Defendants are employers within the meaning of the term “employer” in the New
10 Jersey State Wage and Hour Law, N.J.S. § 34:11-56a1(h). Defendants have employed or
11 continue to employ “individuals” including Ms. Shearn and Mr. Barbieri, and each member of
12 the prospective New Jersey Class as “employees” within the meaning “employ,” “individuals,”
13 and “employees,” in the New Jersey State Wage and Hour Law, N.J.S. § 34:11-56a1(f)-(h).

14 64. Defendants have failed to pay Ms. Shearn, Mr. Barbieri, and the New Jersey Class
15 members overtime compensation at a rate of one and one-half times their regular hourly wages
16 for each hour of working time in excess of forty (40) hours in a workweek as required by the New
17 Jersey State Wage and Hour Law, N.J.S. § 34:11-56a4.

18 65. Defendants’ violation of the New Jersey State Wage and Hour Law, as described
19 in this Complaint, has been willful and intentional.

20 66. As a direct and proximate cause of Defendants’ willful and intentional violation of
21 the New Jersey State Wage and Hour Law, Plaintiffs have suffered damages that they are entitled
22 to recover from Defendant.

23
24
25
26 **EIGHTH CLAIM FOR RELIEF**

27 **(Failure to Pay Overtime Compensation in Violation of New York Law, on Behalf of**
28 **New York Named Plaintiffs and the New York Class)**

1
2 67. The New York Named Plaintiff, Leslie Marie Shearn, on behalf of herself and all
3 members of the New York Class, alleges and incorporates by reference the allegations in the
4 preceding paragraphs.

5 68. At all times relevant to this action, the New York Named Plaintiff and the New
6 York Rule 23 Class were employed by Defendants within the meaning of New York Labor Law,
7 Article 19.

8 69. By the course of conduct set forth above, Defendants have violated the New York
9 Labor Law Article 19, §§ 650 *et seq.*, and the supporting New York State Department of Labor
10 Regulations, 12 N.Y.C.R.R. Part 142 (“New York Labor Law”).

11 70. New York Labor Law requires an employer, such as Defendants to pay overtime
12 compensation to all non-exempt employees. The New York Labor Law also requires an
13 employer to pay employees for all hours worked at the agreed upon rate of pay.
14

15 71. Defendants have had a policy and practice of failing and refusing to pay minimum
16 wages and proper overtime pay to the New York Named Plaintiff and to the New York Rule 23
17 Class for their hours worked.
18

19 72. As a result of Defendants’ failure to pay wages earned and due, and its decision to
20 withhold wages earned and due to the New York Named Plaintiff and the New York Rule 23
21 Class, Defendants have violated and continues to violate the New York Labor Law.

22 73. The New York Named Plaintiff, on behalf of herself and the New York Rule 23
23 Class, seeks the amount of their underpayments based on Defendants’ failure to pay wages of at
24 least the minimum wage for all hours worked, and one and one half times the regular rate of pay
25 for work performed in excess of forty per week, as provided by the New York Labor Law, and
26 such other legal and equitable relief from Defendants’ unlawful and willful conduct as the Court
27
28

1 deems just and proper. The New York Named Plaintiff does not seek liquidated damages on
2 behalf of the New York Rule 23 Class.

3 74. The New York Named Plaintiff, on behalf of herself and the New York Rule 23
4 Class, seeks recovery of attorneys' fees and costs to be paid by Defendants as provided by the
5 New York Labor Law.
6

7 **NINTH CLAIM FOR RELIEF**

8 **(Unlawful Deductions from Wages in California, under California Labor Code Sections**
9 **221 and 224, and IWC Wage Order 4)**

10 75. The California Plaintiffs, on behalf of themselves and all members of the
11 California Class, allege and incorporate by reference the allegations in the preceding paragraphs.
12

13 76. Defendants have a policy and practice of deducting from employees' wages
14 uncollected loan application fees when loans are ultimately not funded by Defendants. The loan
15 application fees that Defendants unlawfully deduct are taken from employees' base wages,
16 regardless of whether or not employees earn any commissions, and are not taken for the benefit of
17 the employees, or authorized by the employees or by any regulation.
18

19 77. Even if loan application fees were in any instance deducted from commissions,
20 Defendants have no legitimate agreement with employees which might permit Defendants to
21 deduct uncollected loan application fees from commissions. Such deductions are, in any event,
22 contrary to the public policy underpinning California's wage and hour laws.

23 78. California Labor Code §221 provides that "it shall be unlawful for any employer to
24 collect or to receive from an employee any part of the wages theretofore paid by said employer to
25 said employee." Cal. Lab. Code §221. Section 221 prohibits deductions from an employee's
26 wages for cash shortages and other business losses. Likewise, California Labor Code § 224
27 proscribes any deduction which is not either authorized by the employee in writing or permitted
28

1 by law.

2 79. As described in the California Department of Labor Standards Enforcement,
3 Enforcement Policies and Interpretations Manual § 11.3, deductions are only permitted for items
4 which are for the direct benefit of the employee—deductions which in any way benefit the
5 employer, directly or indirectly, are prohibited.
6

7 80. Industrial Welfare Commission (IWC) Order No. 4 also prohibits wage
8 deductions, inter alia, “for any cash shortage....” Cal. Code Regs. Title 8, § 11040 (8).

9 81. As a result of Defendants’ unlawful deductions from the wages of the California
10 Plaintiffs and the California Rule 23 Class, Defendants have violated and continues to violate
11 California law.

12 82. The California Plaintiffs, on behalf of themselves and the California Rule 23
13 Class, seek the amount of unlawful deductions, and such other legal and equitable relief from
14 Defendants’ unlawful deductions as California law permits and as the Court deems just and
15 proper.
16

17 83. The California Plaintiffs, on behalf of themselves and the California Rule 23
18 Class, seek recovery of attorneys’ fees and costs to be paid by Defendants as provided by
19 California law.
20

21
22 **TENTH CLAIM FOR RELIEF**

23 **(Unlawful Deductions from Wages in New York, under N.Y. Lab. Law Sec. 193(1) and**
24 **N.Y. Comp. Codes. R. & Regs. Title 12, Sec. 142-1.1 et seq.)**

25
26 84. The New York Named Plaintiff, on behalf of herself and all members of the New
27 York Class, allege and incorporate by reference the allegations in the preceding paragraphs.

28 85. Defendants have a policy and practice of deducting from employees’ wages

1 uncollected loan application fees when loans are ultimately not funded by Defendants. The loan
2 application fees that Defendants unlawfully deduct are taken from employees' base wages,
3 regardless of whether or not employees earn any commissions, and are not taken for the benefit of
4 the employees, or authorized by the employees or by any regulation.

5
6 86. Even if loan application fees were in any instance deducted from commissions,
7 Defendants have no legitimate agreement with employees which might permit Defendants to
8 deduct uncollected loan application fees from commissions. Such deductions are, in any event,
9 contrary to the public policy underpinning New York wage and hour laws.

10 87. New York Labor Law Section 193 provides that "No employer shall make any
11 deduction from the wages of an employee. . . ." N.Y. Lab. Law § 193 (1).

12 88. The New York Department of Labor's Minimum Wage Order for Miscellaneous
13 Industries and Occupations provides that "[w]ages shall ne subject to no deductions, except for
14 allowances¹ authorized in this Part, and except for deductions authorized by law, such as for
15 social security and income tax." N.Y. Comp. Codes R. & Regs. Title 12, § 142-2.10(a). The
16 Order also expressly prohibits "deductions for cash shortages or losses." N.Y. Comp. Codes R. &
17 Regs. Title 12, § 142-2.10(a)(2).

18
19 89. As a result of Defendants' unlawful deductions from the wages of the New York
20 Named Plaintiff and the New York Rule 23 Class, Defendants have violated and continue to
21 violate New York law.

22
23 90. The New York Named Plaintiff, on behalf of herself and the New York Rule 23
24 Class, seeks the amount of unlawful deductions, and such other legal and equitable relief from
25
26

27
28 ¹ The only authorized allowances are allowances for meals and lodging, or allowances for tips. N. Y.
Comp. Codes R. & Regs. Title 12, § 142-2.5. Such do not apply in this case.

1 Defendants' unlawful deductions as New York law permits and as the Court deems just and
2 proper.

3 91. The New York Named Plaintiff, on behalf of herself and the New York Rule 23
4 Class, seeks recovery of attorneys' fees and costs to be paid by Defendants as provided by New
5 York law.

7 **ELEVENTH CLAIM FOR RELIEF**

8 **(Unlawful Deductions from Wages in New Jersey, under N.J. Stat. Ann. Sec. 34:11-4.4)**

10 92. The New Jersey Named Plaintiffs, on behalf of themselves and all members of the
11 New Jersey Class, allege and incorporate by reference the allegations in the preceding paragraphs.

12 93. Defendants have a policy and practice of deducting from employees' wages
13 uncollected loan application fees when loans are ultimately not funded by Defendants. The loan
14 application fees that Defendants unlawfully deduct are taken from employees' base wages,
15 regardless of whether or not employees earn any commissions, and are not taken for the benefit of
16 the employees, or authorized by the employees or by any regulation.

18 94. Even if loan application fees were in any instance deducted from commissions,
19 Defendants have no legitimate agreement with employees which might permit Defendants to
20 deduct uncollected loan application fees from commissions. Such deductions are, in any event,
21 contrary to the public policy underpinning New Jersey wage and hour laws.

23 95. New Jersey's wage law provides that "[n]o employer may withhold or divert any
24 portion of an employee's wages." N.J. Stat. Ann. § 34:11-4.4.

25 96. As a result of Defendants' unlawful deductions from the wages of the New Jersey
26 Named Plaintiffs and the New Jersey Rule 23 Class, Defendants have violated and continues to
27 violate New Jersey law.
28

1 97. The New Jersey Named Plaintiffs, on behalf of themselves and the New Jersey
2 Rule 23 Class, seek the amount of unlawful deductions, and such other legal and equitable relief
3 from Defendants' unlawful deductions as New Jersey law permits and as the Court deems just
4 and proper.

5 98. The New Jersey Named Plaintiffs, on behalf of themselves and the New Jersey
6 Rule 23 Class, seek recovery of attorneys' fees and costs to be paid by Defendants as provided by
7 New Jersey law.
8

9
10 **PRAYER FOR RELIEF**

11 99. WHEREFORE, Plaintiffs, on behalf of themselves and all members of the
12 Proposed Class, pray for relief as follows:

- 13 A. That the Court determine that this action may proceed as a class action
14 under Rule 23(b)(1) and (3) of the Federal Rules of Civil Procedure;
- 15 B. That Defendants are found to have violated the overtime, meal/rest period,
16 itemized wage statement/time records, unlawful deduction, and/or waiting
17 time penalty provisions of the state wage laws cited above as to the
California, New Jersey, and New York Classes identified above;
- 18 C. That Defendants are found to have violated the overtime provisions of the
19 FLSA as to Plaintiffs and the Collective Class;
- 20 D. That Defendants are found to have violated the FLSA by failing to
21 maintain accurate time records of all the hours worked by Plaintiffs and the
Class;
- 22 E. That Defendants' violations as described above are found to be willful;
- 23 F. An award to Plaintiffs and the Class for the amount of unpaid wages owed,
24 including interest thereon, and penalties subject to proof at trial;
- 25 G. That Defendants be ordered and enjoined to pay restitution to Plaintiffs and
26 the Classes due to Defendants' unlawful activities, pursuant to state laws
cited above;
- 27 H. That Defendants further be enjoined to cease and desist from unlawful
28 activities in violation of state laws cited above;

- 1 I. An award of reasonable attorneys' fees and costs pursuant to 29 U.S.C.
2 section 216 and/or other applicable state laws; and
- 3 J. For such other and further relief, in law or equity, as this Court may deem
4 appropriate and just.

5 **JURY DEMAND**

6 100. Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs,
7 individually and on behalf of all others similarly situated, demand a trial by jury.

8
9 Dated: September 8, 2008

/s/ Bryan J. Schwartz

10 **NICHOLS KASTER & ANDERSON**

11 Donald H. Nichols, MN State Bar No. 78918

12 (admitted **pro hac vice**)

13 Paul J. Lukas, MN State Bar No. 22084X

(admitted **pro hac vice**)

14 Tim C. Selander, MN Bar No. 0387016

(admitted **pro hac vice**)

NICHOLS KASTER & ANDERSON, PLLP

15 4600 IDS Center

16 80 S. 8th Street

Minneapolis, MN 55402

17 Bryan J. Schwartz, CA State Bar No. 209903

18 Matthew C. Helland, CA State Bar No. 250451

NICHOLS KASTER & ANDERSON, LLP

19 One Embarcadero Center, Ste. 720

20 San Francisco, CA 94111